KOH THONG KUANG

v.

UNITED MALAYAN BANKING CORPORATION BERHAD

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HAJI MOHD AZMI BIN DATO' HAJI KAMARUDDIN SCJ,
DATO' MOHAMED DZAIDDIN BIN HAJI ABDULLAH SCJ,
DATO' V.C. GEORGE J.
[CIVIL APPEAL NO. 02-178-94]
6 SEPTEMBER 1994

PRACTICE & PROCEDURE: Substituted service - Bankruptcy notice - Whether order for substituted service thereof properly granted - Appellant had addresses both in Malaysia and England - Appellant's last known address - Whether in Malaysia - Whether appellant had permanently moved out of Malaysia - Order for substituted service granted only in respect of address in Malaysia - Whether service thereof bad - Advertisement of bankruptcy notice only in Malaysian newspaper - Whether effective notice of the proceedings given to appellant.

The appellant in this case was a guarantor of a customer of the respondent (the bank) and had executed a letter of guarantee wherein he stated his residential address as No. 146, Jalan Maarof, Bangsar, Kuala Lumpur (house No. 146). On 15 December 1989, the bank obtained judgment against the appellant and subsequent to that, an order to effect service of a bankruptcy notice (the notice) on the appellant by way of substituted service. Pursuant to the order the bank effected service of the notice on the appellant, *inter alia*, by posting the notice and the order thereof on house No. 146 and by advertising the same in an issue of the Malay Mail, a local English daily. At that time, however, the appellant had already moved out of house No. 146 and was seemed to be residing somewhere else.

By an affidavit filed two days after the effective date of the substituted service, the appellant claimed that at the material time he was residing at several addresses in England and that those addresses were known to the bank by virtue of previous bankruptcy proceedings taken against him by the bank. In the circumstances the appellant contended that the order for substituted service herein was not properly obtained and therefore the service of the said notice on him was bad in law.

The facts however showed that after leaving house No. 146 the appellant had no specific place of residence and that between 1989 and 1993 there was evidence which showed that he had been in and out of Malaysia at least on 14 different dates. Before this Court the main issue that arose was whether in the circumstances the bank was justified in taking house No. 146 as the appellant's last known address for service and hence, whether service of the notice on house No. 146 herein was a proper service.

Held:

[1] The bank and its solicitors in the circumstances were justified in concluding as they did that the appellant was deliberately evading service and in the face of the various addresses given out by the appellant as being his residential address, were also entitled to decide on house No. 146 as being the last known address of the appellant although it was then clear that the appellant was no longer residing at that address.

[2] Contrary to the appellant's contention in his affidavit, there does not appear to be anything to be relied on in the previous bankruptcy proceedings which shows that the

bank or it's solicitors were or should have been aware that the respondent had resided in England for the past few years. It is also clear that when the application for substituted service was made there was nothing which reliably suggested to the bank or its solicitors that the appellant had permanently moved out of Malaysia. The evidence available to the bank and its solicitors was that the appellant had addresses both in England and in Malaysia and was frequently travelling from Malaysia and England and back to Malaysia and *vice versa*.

[3] Be that as it may, an advertisement in either the English or Malaysian newspaper is equally effective to give the appellant notice of the proceedings. As the facts showed, because of the advertisement herein, the appellant had become aware, within two days of the effective date of the substituted service of the bankruptcy notice, of its existence and was able to have affirmed and filed the affidavit in support by which he sought to have the notice set aside.

[Appeal dismissed].

[Bahasa Malaysia Translation of Headnote]

AMALAN & PROSEDUR: Penyampaian Ganti - Notis Kebankrapan - Samada perintah untuk penyampaian ganti telah diberikan dengan betul - Perayu mempunyai alamat di Malaysia dan England - Alamat terakhir perayu - Samada di Malaysia - Samada perayu telah secara tetap berpindah keluar dari Malaysia - Perintah untuk penyampaian ganti diberikan berhubung dengan alamat di Malaysia sahaja - Samada penyampaiannya tidak wajar - Pengiklanan notis kebankrapan hanya dalam surat khabar di Malaysia sahaja - Samada notis yang berkesan mengenai prosiding tersebut telah diberikan kepada perayu.

Perayu dalam kes ini merupakan seorang penggerenti salah seorang pelanggan responden (bank tersebut) dan telah menyempurnakan satu surat gerenti dalam mana beliau telah menyatakan alamat kediamannya sebagai No. 146, Jalan Maarof, Bangsar, Kuala Lumpur (Rumah No. 146). Pada 15 Disember 1989, bank tersebut telah mendapatkan penghakiman terhadap perayu dan berikutan itu, satu perintah untuk menguatkuasakan penyampaian notis kebankrapan (notis tersebut) ke atas perayu melalui penyampaian ganti. Selaras dengan perintah itu, bank tersebut telah menguatkuasakan penyampaian notis tersebut ke atas perayu, antara lainnya, dengan menampalkan notis tersebut dan perintahnya pada rumah No. 146 dan dengan mengiklankannya dalam satu keluaran akhbar Malay Mail, akhbar harian Bahasa Inggeris tempatan. Pada waktu itu, bagaimana pun, perayu telah pun berpindah keluar dari rumah No. 146 dan didapati bermastautin di tempat yang lain.

Melalui afidavit yang difailkan dua hari selepas tarikh penguatkuasaan penyampaian ganti tersebut, perayu menuntut bahawa pada waktu yang material beliau telah bermastautin di beberapa alamat di England dan bahawa alamat-alamat itu diketahui oleh bank tersebut menurut prosiding-prosiding kebankrapan terdahulu yang telah diambil terhadap beliau oleh bank tersebut. Dalam keadaan yang sedemikian, perayu menegaskan bahawa perintah untuk penyampaian ganti di sini telah tidak diperolehi dengan sewajarnya dan oleh itu penyampaian notis tersebut ke atasnya adalah tidak wajar di sisi undang-undang.

Fakta-fakta walau bagaimanapun menunjukkan bahawa selepas meninggalkan rumah No. 146, perayu tidak mempunyai tempat kediaman yang khusus dan bahawa antara tahun 1989 dan 1993 terdapat bukti yang menunjukkan bahawa beliau telah keluar

dari dan masuk semula ke Malaysia sekurang-kurangnya pada 14 tarikh yang berlainan. Di hadapan Mahkamah ini isu utama yang berbangkit adalah samada dalam keadaan tersebut bank mempunyai alasan yang kuat dalam mengambil rumah No. 146 sebagai alamat terakhir perayu yang diketahui untuk penyampaian dan oleh yang demikian, sama ada penyampaian notis ke atas rumah No. 146 di sini adalah merupakan satu penyampaian yang wajar.

Diputuskan:

[1] Bank tersebut dan peguamcaranya dalam keadaan itu mempunyai alasan yang kuat dalam memutuskan sepertimana yang mereka lakukan bahawa perayu telah dengan sengajanya mengelak penyampaian dan berhadapan dengan beberapa alamat yang diberikan oleh perayu sebagai alamat-alamat kediamannya, adalah juga berhak untuk memutuskan rumah No. 146 sebagai alamat terakhir perayu yang diketahui walaupun jelas ketika itu bahawa perayu tidak lagi tinggal di alamat tersebut.

[2] Bercanggahan dengan penegasan perayu dalam afidavitnya, tiada apa-apa dalam prosiding-prosiding kebankrapan terdahulu yang menunjukkan bahawa bank atau peguamcaranya seharusnya atau telah pun mengetahui bahawa responden telah bermastautin di England beberapa tahun yang lalu. Adalah juga jelas bahawa ketika permohonan untuk penyampaian ganti dibuat, tidak terdapat apa-apa yang dengan pastinya menyarankan kepada bank atau peguamcaranya bahawa perayu telah secara tetap berpindah keluar daripada Malaysia. Bukti yang ada pada bank dan peguamcaranya adalah bahawa perayu mempunyai kedua-dua alamat di England dan di Malaysia dan kerap mengembara dari Malaysia ke England dan balik semula ke Malaysia serta *vice versa*.

[3] Walau bagaimanapun, sesuatu iklan samada dalam akhbar Bahasa Malaysia atau Inggeris adalah sama berkesan bagi memberikan notis mengenai prosiding-prosiding tersebut kepada perayu. Sepertimana yang ditunjukkan oleh fakta-fakta tersebut, disebabkan oleh iklan di sini, perayu telah mengetahui, dalam tempoh 2 hari dari tarikh penguatkuasaan penyampaian ganti notis kebankrapan tersebut, mengenai kewujudannya dan telah dapat mengikrarkan serta memfailkan afidavit sokongan melalui mana beliau memohon untuk mengenepikan notis tersebut.

[Rayuan ditolak].

Case referred to:

Re Peh Kong Wan [1992] 2 MLJ 292 ***(dist)***

For the appellant - Ranjit Singh; M/s. Cheang & Ariff
For the respondent - T. Thomas; M/s. Skrine & Co.

JUDGMENT

V.C. George J:

This appeal was dismissed with costs. We now give our reasons for having done so.

The appeal was said to turn on the one issue, whether the service of the bankruptcy notice on the appellant was good service. It turned out that the real bone of contention was the appellant's complaint that the order for substituted service had been improperly obtained.

The petitioner bank, the respondent in the appeal, had obtained judgment against the appellant in the High Court at Kuala Lumpur on 15 December 1989 for RM4,024,013.85

interests and costs - the appellant had been sued as a guarantor of a customer of the bank. In the letter of guarantee the appellant's address is given as No. 146 Jalan Maarof Bangsar, Kuala Lumpur.

The petitioner had obtained an order for substituted service (SS) of the bankruptcy notice pursuant to which service was to be effected on the appellant by posting a copy of the notice and of the order for SS on the notice board of the Court and also on a conspicuous part of the premises known as No. 146 Jalan Maarof Bangsar 59000 K.L. on the basis that that was the last address of the said judgment debtor (i.e. the appellant) known to the bank and by advertisement in one issue of any daily newspaper. The SS was purported to be effected in terms of the order, the required advertisement being in an issue of the Malay Mail, the effective date of the substituted service being 7 April 1993. Two days later, on 9 April 1993, the appellant affirmed his "affidavit on an application to set aside bankruptcy notice." It was affirmed in Kuala Lumpur before a Commissioner for Oaths.

Now, as the real bone of contention of the appellant is that the order for substituted service should not have been given, the application should have been for an order setting aside the order for SS and not as is the case here, for the bankruptcy notice to be set aside. However we decided to deal with the appeal on the basis that in fact the real bone of contention (i.e. the propriety of the order for SS), was before the learned Registrar, the learned Judge in the High Court and before us.

The application for SS was made on the basis that it was not possible to effect personal service of the notice on the judgment debtor as at all relevant times his whereabouts was not known to the petitioner on whose behalf it was said that the last known address of the appellant as far as the petitioner and its solicitors were concerned was No. 146, Jalan Maarof, Bangsar, 59000 Kuala Lumpur.

The process server in attempting to serve the bankruptcy notice on the appellant at that address had been told by an occupant of the premises that the appellant had shifted from there. The process server had thereafter, in purported compliance with Practice No. 1 of 1968, sent a letter of appointment addressed to the appellant at the No. 146 Jalan Maarof address (presumably on the basis that he might after all be there) and pursuant to it duly called at the address on the appointed day which was Tuesday the 16 June 1993 to find the premises locked. He called out the name of the appellant but nobody answered. The letter of appointment eventually was returned to the petitioner's solicitors endorsed "Pindah/left."

The appellant contends by his affidavit of 9 April 1993 that for the previous 6 years he had resided in England. He says that the petitioner and/or its solicitor "are fully aware of the above by virtue of previous bankruptcy proceedings taken against me *vide* No. D5-29-2400-91."

It turned out that there had indeed been an earlier petition taken out by the instant petitioner in respect of the same judgment debt relied on in the instant petition. There, in applying for substituted service the appellant's last known address was erroneously given by the appellant as No. 145 Jalan Maarof instead of No. 146. When the appellant applied to set aside the bankruptcy notice in that petition on the basis of the error made in respect of the address at Jalan Maarof, the bank conceded that the order for SS was bad as the respondent's last known address was No. 146 and not No. 145 and accordingly the petition was withdrawn and it was thereafter that the bank commenced the instant bankruptcy proceedings. It is to be noted that contrary to the appellants contention in

his said affidavit, in fact there does not appear to be anything to be relied on in the previous bankruptcy proceedings which shows that the petitioner and/or its solicitors were or should have been aware that the respondent had resided in England for the previous 6 years.

Now, it would seem that the appellant, although he had in providing the continuing letter of guarantee given his address therein as No. 146 Jalan Maarof, had not informed the bank of his new address when he moved out of No. 146. No doubt in anticipation of that happening, the letter of guarantee had in it a provision that notices could be sent by the bank to the guarantor's last known address.

In the said affidavit of 9 April 1993 the appellant states on oath that he resides at 15, Bolton Street, London, England; in another affidavit affirmed on 16 July 1993 he states on oath that his residential address is 14 Condray Place, London SW11 3 PE. In a sale and purchase agreement dated 22 April 1989 his address is given as No. 8, Chendrai Lucky Garden, Kuala Lumpur. A letter from his London solicitors shows that the 15, Bolton Street address is in fact their address. It is obviously unlikely that he resided at that address. In yet another affidavit, this time by his solicitor one R.G. Hillman, the deponent states that he had been advised by the appellant that he resides at No. 7 Little Cedars, Finchley England!

Now, *inter alia* the contents of the appellant's passport which is a Malaysian passport, some of the affidavits filed on his behalf and the sale and purchase agreement in respect of No. 146 Jalan Maarof, all serve to show that the appellant had been at all relevant times frequently in and out of Malaysia. There is evidence that between 1989 and 1993 he had entered or had been in Malaysia at least on 14 different dates.

We are of the opinion that the bank and its solicitors were justified in concluding as they did that the appellant was deliberately evading service and in the face of the various addresses he had given as being his residential addresses were entitled, in directing their mind as to what the last known address of the appellant is, to decide on the No. 146 Jalan Maarof address although it was clear that he was no more residing at that address.

When the application for SS was made there was nothing which reliably suggested to the bank or its solicitors that the appellant had permanently moved out of Malaysia. This was unlike the case of the applicant in *Re Peh Kong Wan* [1992] 2 MLJ 292 the judgment in which case was cited to us. In that case the real issue for adjudication was whether, the applicant, at the time the bankruptcy petition was presented against him was domiciled in Malaysia. Whether the bank there was aware of the applicant's domicil was not really an issue.

In *Re Peh Kon Wan* it was pointed out at page 296 that:

> ...in respect of applications for substituted service where it is known or ought to be known that the respondent has ceased to reside in the last known address (as was the case here), the registrar should be provided with some evidence as to the probable whereabouts of the respondent. The petitioner should make reasonable inquiries as to the whereabouts of the respondent and if it is suspected that he is out of the jurisdiction, that suspicion should be brought to the attention of the Court so the order for substituted service could be formulated to the end that the respondent will, in all probability, get to know of the fact of the bankruptcy notice or the presentation of the petition as the case may be.

In the instant case, as has been seen, the evidence available to the bank and its solicitors was that the appellant had addresses both in England and in Malaysia and was

frequently travelling from Malaysia to England and back to Malaysia or *vice versa*. It would seem that an advertisement in either the English or Malaysian newspapers would in all probability have been equally effective to give him notice of the proceedings. As it turned out the appellant had been aware, within two days of the effective date of the substituted service of the bankruptcy notice, of its existence and was able to have affirmed and filed the affidavit in support by which he sought to have it set aside. This demonstrates the efficacy of the SS procedures provided by the rules and streamlined as it were by Practice Note No. 1 of 1968 which we would exhort should be applied not blindly but *mutatis mutandis* the facts of each situation.

In the circumstances we had no doubt that the learned Registrar was perfectly justified in dismissing the application as was the learned Judge in dismissing the appeal from the Registrar's decision. The appeal was accordingly dismissed with costs.